United States District Court Northern District of Texas Lubbock Division

STATE OF TEXAS,

Plaintiff,

v.

MERRICK GARLAND, et al.,

Defendants.

No. 5:23-cv-34-H

TEXAS'S MOTION TO EXCLUDE DEFENDANTS' EXHIBITS 2, 3, 4, 7, 8, 11, AND 15

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

DEFENDANTS' EXHIBIT DX-015

STATE OF TEXAS,

Plaintiff,

V.

Case No. 5:23-cv-00034-H

MERRICK GARLAND, in his official capacity as Attorney General, et al.,

Defendants.

DECLARATION OF KELLY KINNEEN

I, Kelly Kinneen, make the following declaration based upon my personal knowledge, upon information provided in my official capacity, and upon conclusions I reached based on that knowledge or information:

- 1. I am the Assistant Director for Budget of the Office of Management and Budget (OMB) in the Executive Office of the President (EOP), in Washington, D.C. I have served in this position since 2017, and have worked at OMB since 2006.
- 2. I am the senior-most career official responsible for supporting the OMB Director in developing all aspects of the President's Budget. Additionally, I advise OMB leadership and Federal agencies on questions relating to implementing laws that provide funding to the Federal government, including annual appropriations acts.
- 3. I have been asked to summarize the Consolidated Appropriations Act, 2023, Public Law 117-328 (the "Act" or the "2023 Act"), to describe the process by which funds appropriated under the Act are obligated and expended by Federal agencies, and to explain how a ruling enjoining the entire Act would present unprecedented challenges and disruptions. *See generally* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2022) ("2023 Appropriations Act").

Summary of the Consolidated Appropriations Act, 2023

- 4. Congress passed the Act on December 23, 2022, and the President signed it into law on December 29, 2022. The Act is commonly known as an "omnibus" appropriations bill, because it includes all twelve of the regular annual appropriations bills (included as divisions A through L) that largely fund the operations of the three branches of the Federal government. The twelve regular annual appropriations bills included in the Act are:
 - a. Division A—Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2023: This division, among other things, provides funding for the Department of Agriculture, including programs for farm production and conservation, and rural development. It also funds food and nutrition programs for socioeconomically disadvantaged populations, including the National School Lunch and School Breakfast programs, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and the Supplemental Nutrition Assistance Program (SNAP). This division also funds the Food and Drug Administration.
 - b. Division B—Commerce, Justice, Science, and Related Agencies Appropriations Act, 2023: This division, among other things, provides funding for the Department of Commerce, including the National Oceanic and Atmospheric Administration; and the Department of Justice, including the Bureau of Prisons, Federal Bureau of Investigation, and Drug Enforcement Administration. This division also funds the Equal Employment Opportunity Commission, National Aeronautics and Space Administration, and the National Science Foundation.
 - c. Division C—Department of Defense Appropriations Act, 2023: This division, among other things, provides funding for the Department of Defense, except for

- military construction and the U.S. Army Corps of Engineers. This division includes funding for the pay of military personnel, operation and maintenance costs, and major procurements, including submarines, such as the Columbia Class Submarine, aircraft, and weapons systems.
- d. Division D—Energy and Water Development and Related Agencies Appropriations Act, 2023: This division, among other things, provides funding for the Department of Energy, National Nuclear Security Administration, Bureau of Reclamation, and the U.S. Army Corps of Engineers. This division includes funding for nuclear energy programs, the Strategic Petroleum Reserve, and nuclear weapons activities and non-proliferation.
- e. Division E—Financial Services and General Government Appropriations Act,

 2023: This division, among other things, provides funding for the Department of
 the Treasury, Executive Office of the President, the Judicial Branch, the District of
 Columbia, General Services Administration, Small Business Administration, and
 independent agencies such as the Federal Election Commission, Consumer

 Product Safety Commission, and Federal Trade Commission.
- f. Division F—Department of Homeland Security Appropriations Act, 2023: This division, among other things, provides funding for the Department of Homeland Security, including U.S. Customs and Border Protection, Immigration and Customs Enforcement, the Federal Emergency Management Agency, the Transportation Security Administration, and the Coast Guard.
- g. Division G—Department of the Interior, Environment, and Related Agencies

 Appropriations Act, 2023: This division, among other things, provides funding for
 the Department of the Interior (including the Bureau of Indian Affairs, Bureau of

- Indian Education, and the Indian Health Service), Environmental Protection Agency, and the Forest Service.
- h. Division H—Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2023: This division, among other things, provides funding for the Departments of Labor, Health and Human Services, and Education. This division includes funding for the Employment and Training Administration, Centers for Disease Control and Prevention, Centers for Medicare and Medicaid Services, National Institutes of Health, Substance Abuse and Mental Health Services Administration, Administration for Children and Families, Advanced Research Projects Agency for Health, and Office of Federal Student Aid.
- Division I—Legislative Branch Appropriations Act, 2023: This division provides funding for the Legislative Branch.
- j. Division J—Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2023: This division, among other things, provides funding for the Department of Veterans Affairs and the military construction program of the Department of Defense.
- k. Division K—Department of State, Foreign Operations, and Related Programs

 Appropriations Act, 2023: This division, among other things, provides funding for
 the Department of State, United States Agency for International Development,
 and United States International Development Finance Corporation. This division
 includes funding for diplomacy abroad, contributions to international
 organizations, and economic assistance and military financing to foreign countries
 and other international partners.

- 1. Division L—Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2023: This division, among other things, provides funding for the Departments of Transportation and Housing and Urban Development. This division includes liquidating authority for the Department of Transportation's airports, highways, and transit programs, and funding for highway infrastructure projects and the Federal Aviation Administration. This division also includes funding for tenant-based and project-based rental assistance programs, homeless assistance, and other housing programs.
- 5. In addition to the 12 annual appropriations bills, the 2023 Act also includes two supplemental appropriations bills focused on the conflict in Ukraine, including for the procurement of missiles and ammunition, and disaster relief (Divisions M and N), respectively.
- As is typical with an annual omnibus bill, the Act also includes discrete acts making changes to permanent law, most of which are unrelated to the discretionary appropriations included in the Act. These divisions in the 2023 Act include, among other things, bipartisan revisions to the Electoral Count Act relevant to Presidential elections (Division P); legislation to provide protections to pregnant workers and nursing mothers (Divisions II and KK); healthcare measures, including an extension of the requirement that Medicare cover telemedicine and protections against future pandemics (Division FF); an act to provide countermeasures against ransomware and other cyber-related attacks by foreign actors (Division BB, Title V); and the Fairness for 9/11 Families Act (Division MM).
- 7. Annual appropriations included in the Act provide funding and authority for certain agency operations in Fiscal year (FY) 2023, which began on October 1, 2022, and runs through

September 30, 2023. The authorities and funding included in the Act cover the entire fiscal year.

The Process of Obligating and Expending Appropriated Funds

- 8. Upon the enactment of appropriations bills such as the 2023 Act, there is a multi-step process by which Federal agencies obligate and expend appropriated funds.
- 9. The 2023 Act provided "budget authority" to the various departments, agencies, and instrumentalities of the Federal government. OMB Circular A-11, *Preparation, Submission, and Execution of the Budget*, § 20.3 (Aug. 2022) ("OMB Circular A-11"), *available at* https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf, defines "budget authority" as "the authority provided by law to incur financial obligations that will result in outlays."
- 10. According to the FY 2024 President's Budget estimates, the total amount of budget authority enacted in the 2023 Act is \$1.7 trillion in discretionary appropriations and \$1.31 trillion in mandatory appropriations, for a total of approximately \$3 trillion. See Office of Mgmt. & Budget, Budget of the U.S. Government, Fiscal Year 2024 at p. 170, available at https://www.whitehouse.gov/wp-content/uploads/2023/03/budget_fy2024.pdf.
- 11. After Congress enacts legislation that provides budget authority, pursuant to 31 U.S.C. §§

 1512-13, the President must "apportion" the budget authority to the relevant Federal agencies before each agency may obligate its funds. The President has delegated this apportionment authority to the OMB Director. OMB apportions funds to Executive Branch agencies by time periods, specific activities or projects, or a combination thereof. 31 U.S.C. § 1512(b)(1); OMB Circular A-11 § 120.1.
- 12. As of December 29, 2022, OMB had apportioned all of the funds provided in the 2023 Act.

 See OMB Circular A-11, § 120.41.

- Once funds are apportioned, agencies may "obligate" the funds. The Government Accountability Office (GAO) defines an obligation as "[a] definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States."

 U.S. Gov't Accountability Office, A Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP, at 70 (2005), available at https://www.gao.gov/assets/gao-05-734sp.pdf.

 An agency enters an obligation where, for example, it places an order, signs a contract, awards a grant, purchases a service, or takes other actions that require the government to make payments to the public or from one government account to another. OMB Circular A-11 § 20.5(a).
- 14. Agencies must "record" obligations when they occur. 31 U.S.C. § 1501; OMB Circular A-11 § 20.5.
- 15. An "expenditure" or "outlay" occurs when an agency makes a payment to liquidate an obligation. OMB Circular A-11 § 20.6.
- 16. Through May 1, 2023, Executive Branch agencies had seven months of the current fiscal year to incur thousands of obligations made available by the 2023 Act, which include legal commitments to third parties through Federal contracts, grants, and loans (including loan guarantees), as well as the salaries of Federal employees and military personnel.
- 17. To date, OMB estimates that the Executive Branch has obligated and expended billions of dollars of the funds provided in the 2023 Act.

Lapses in Appropriations

18. The vast majority of the funding provided by the annual appropriations bills is time-limited.

This means that, after a certain amount of time, the funding ceases to be available to

- agencies to make new obligations. In most cases, the time-limit for obligating funds is one fiscal year, but there are some appropriations that are available for obligation for more than one fiscal year or have no time limit. When the time limit for obligations has been reached, the funding is colloquially said to have "lapsed."
- 19. There have been several instances in which funding for government programs lapsed and

 Congress failed to pass new appropriations bills to provide funding for programs to operate.

 This is commonly referred to as a "government shutdown."
- 20. Government shutdowns are highly disruptive to government programs. In the absence of appropriations, Federal agencies may not legally incur new obligations except in narrow circumstances. Agency personnel also generally may not support the continued performance of a contract or grant that has already been awarded, unless the contract or grant itself meets one of the narrow exceptions for continuation during a government shutdown.
- During a government shutdown, hundreds of thousands of Federal employees are placed on furlough. Pursuant to 31 U.S.C. § 1341(c), Federal employees will receive retroactive pay after the lapse ends. When salaries and expenses for Federal employees are paid for out of annual appropriations, however, Federal employees receive no compensation during the period of the government shutdown, including the limited subset of employees who are legally permitted to work during the shutdown.
- OMB and agencies prepare for the contingency that there might be a government shutdown whenever the end of a funding period nears, including by communicating with the Federal workforce, contractors, unions, and other stakeholders regarding the actions that they will and will not be permitted to take in the event of a lapse in appropriations. OMB Circular A-11 § 124.

Impact of an Injunction Against the 2023 Act

- 23. An injunction precluding enforcement of the entire 2023 Act would present unprecedented challenges and complications. It would result in an immediate lapse of all FY 2023 appropriations in the Act. With limited exceptions, Federal agency operations would be forced to shut down absent immediate Congressional action. To my knowledge, it would be the first ever lapse in appropriations part-way through the implementation of an appropriations act that provided funding for the entire fiscal year. All other lapses of which I am aware have occurred at the beginning of the fiscal year, or after expiration of a continuing resolution that provided funding for part of the fiscal year.
- 24. In the event of an injunction against the entire 2023 Act, agencies would generally have to cease performance and payments on the thousands of obligations that agencies have already entered into in reliance on the budget authority provided in the 2023 Act.
- 25. Various entities likely have taken significant actions in reliance on the 2023 Act. For instance:
 - a. Private Sector: A wide range of private sector actors likely have already taken actions in reliance on the funding in the 2023 Act, including contractors and grantees who have arranged their operations based on Federal obligations received, as well as small businesses and lenders that are relying or are expecting to rely on loan guarantees from the Small Business Administration or other government agencies.
 - b. State, local, and tribal governments: State, local, and tribal governments often use Federal funds to support authorized activities, including law enforcement, State-operated food inspections, and nutrition assistance for women and children. Many of these government entities may have already structured their budgets, operations,

- and projects based on the Federal funds that they anticipate receiving under the 2023 Act.
- c. Foreign governments: My colleagues at OMB have informed me that foreign nations likely also have taken actions in reliance on foreign assistance appropriated in the 2023 Act. Foreign aid included in the Act includes assistance to Israel, Jordan, and Ukraine, among others, as well as to Central American nations to address the factors that contribute to irregular migrations to the United States. *See, e.g.*, 2023 Appropriations Act, div. K, tit. VII, §§ 7041(d)-(e) (assistance to Israel and Jordan), 7045(a) (assistance for activities in various Central American countries); div. M, tit. VII, "Bilateral Economic Assistance—Economic Support Fund" (assistance for Ukraine).
- d. Federal entities: Federal entities across all three branches of government have relied on funding from the 2023 Act in making personnel decisions. Executive Branch agencies have set their budgets and hired additional employees in reliance on the funding provided under the 2023 Act.
- 26. Adding to the challenge of an injunction against the entire 2023 Act would be that many of the Federal employees who would be responsible for sorting through the unprecedented issues surrounding existing obligations and expenditures would be furloughed for the duration of the lapse.
- 27. The 2023 Act includes appropriations for grants for which Texas-based entities will receive funding. The "Aid to State and Local Governments" chapter from the *Analytical Perspectives* volume of the 2024 President's Budget provides estimates of the amounts each State is expected to receive in discretionary grant funding in FY 2023. The table below includes a subset of the funding that Texas is expected to receive. *See* Office of Mgmt. & Budget,

Budget of the U.S. Government, Fiscal Year 2024: Analytical Perspectives, ch. 8, "Aid to State and Local Governments" tbls. 8-7, 8-13, 8-21, 8-24, 8-31, 8-32, 8-39, *available at* https://www.whitehouse.gov/omb/budget/.¹ All of these grants would be suspended if the entire 2023 Act were enjoined:

Federal Agency	Program	Estimated FY 2023 obligations from	Relevant Provisions of the 2023 Act
ad: Haluesir laksiriy 1981	Souami adrike zalemuses	new authority	himoto misoda ad il
	Title I Grants to Local	1,813,528,000	Division H, Title III
Education	Educational Agencies	- beninne a	"andio 2023 Antro
	Special Supplemental	401,311,000	Division A, Title IV
	Nutrition Program for	eion ' '	
	Women, Infants, and		1
HHS	Children (WIC)	LC. S. ITAK Edelester and	121,82 to manufact 28,12
	Child Care	869,050,000	Division H, Title II
different liberature	Development Block	co hou sure at government	all tell incent holos
HHS	Grant		
HHS	Head Start	798,259,000	Division H, Title II
	FEMA Preparedness	64,388 ,000	Division F, Title III
DHS	Grants		
5 cm - g	Community	124,502,000	Division L, Title II
	Development Block		
HUD	Grant		
	Airport Infrastructure	145,033,000	Division L, Title I
DOT	Grants		

28. My colleagues at OMB have also informed me that Texas state and local law enforcement agencies will likely receive grants totaling hundreds of millions of dollars from the Department of Justice through funding provided in the 2023 Act. In FY 2022, the Department of Justice provided more than \$315 million in grants to state and local agencies or other entities in Texas, and the 2023 Act enacts even higher levels for Department of

¹ 31 U.S.C. § 1105(a)(7) requires the President's Budget to include estimated appropriations and expenditures of the Government for the current year. OMB instructed agencies to include the FY 2023 enacted appropriations in the current year estimates in the FY 2024 Budget.

- Justice grants. See 2023 Appropriations Act, div. B, tit. II, "State and Local Law Enforcement Activities."
- 29. In addition, my colleagues have informed me that the Johnson Space Center in Houston,

 Texas, will likely receive billions of dollars in funding through the 2023 Act. For FY 2023,

 NASA expects the Johnson Space Center to receive approximately \$6 billion.
- 30. The above provides just a small number of examples of the impacts that would result if the entire 2023 Act were enjoined.

CONCLUSION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed in Washington, D.C., on the 4th day of May, 2023.

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2023, I electronically filed the foregoing paper with the Clerk of Court using this Court's CM/ECF system, which will notify all counsel of record of such filing.

/s/Courtney D. Enlow
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